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Foreword

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Foreword

"Should digital antitrust be ordoliberal?"

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History tells us that the concentration of economic power, what US Supreme Court Justice Louis Brandeis described as the curse of bigness, can be as dangerous as the concentration of political power, leading to social unrest and, if the state does not react appropriately and in a timely manner, to the weakening of liberal democracies or, at worst, the outbreak of wars. History also tells us that at the beginning of each industrial revolution, economic power tends to concentrate among the first few firms that master the new technologies. Indeed today, at the dawn of the fourth Industrial Revolution, few big digital conglomerates have accumulated not just important economic but also informational and quasi-regulatory powers. Europe should be particularly worried because most of those conglomerates are based in the US or in China.

As competition policy is one of the most powerful tools for controlling the concentration of private power, it comes as no surprise that there is now a fierce debate among academics on the role of antitrust in digital economy. Some, the neo-Brandeisians, claim that antitrust should go back to its roots and be as forcefully applied against big tech giants as it was against the barons of the second Industrial Revolution. Others, the neo-Schumpeterians, claim that the digital economy is very competitive, with rival products just "one click away" and new invention one garage away, hence markets should be left alone. Many antitrust agencies across the globe have done or commissioned reports on the adaptation of competition policy to the digital era and a consensus is emerging that more intervention is needed.

This debate is key for competition policy as it questions its fundamentals, in particular its objectives and underlying economic theories. It also goes beyond as *ex post* antitrust intervention is often the prelude to more comprehensive *ex ante* economic regulation. To advance the debate, we should first identify the main characteristics of the digital economy and then reflect on how those characteristics should shape the enforcement of competition law.

The characteristics of the digital economy are many and different across business models and digital platforms, but I see at least three characteristics that are key and common to most digital platforms.

– The first characteristic is the market concentration due to the massive direct and indirect network effects as well as the different data feedback loops. The implications of market concentration on market power should be assessed case-by-case because network and feedback effects may be balanced by multi-homing but, often, the first effects are stronger than the latter. Concentration is horizontal within markets but is also "conglomeral" across markets. Indeed, "conglomeralism" is not a bug but a feature of the digital economy. This can be explained by a combination of supply-side and demand-side effects which reinforce each other. On the supply side, product development is often based on sharable modules, like Lego blocks, that can be used and reused to develop very different products or services. For instance, the same dataset may be reused to develop a search engine, a digital map or an autonomous car. This modular design product development generates economies of

scope and reduces the costs of expansion across markets. On the demand side, customers often value the synergies within product ecosystems. For instance, many Apple customers value the smooth and secure interoperability between their iMac, iPad or Apple Watch. Those ecosystem synergies increase the benefits of expansion in different markets. Economies of scope and ecosystem synergies are not new but are very much amplified in the digital economy.

– The second characteristic of the digital economy is the important and rapid pace of innovation. Most of the digital firms do not compete on the price (and surely not on the monetary price that is often absent) nor even on the quality of existing products and services. They compete on the innovation for the next product or service and, then, on its rapid take-up and scale up to reap the full benefit of the network and feedback effects and win the whole market. This is why the R&D spending ratio of the digital firms are higher than the average in the economy.

– The third main characteristic is the high level of uncertainty of technology and market evolution. We know that it is difficult to make predictions, especially about the future. This is even more difficult in the digital economy. This is why Andy Grove, the iconic founder of Intel, famously wrote that only the paranoids survive or why Clayton Christensen warns firms about the risk of disruptive innovation. Indeed, digital innovation is not only sustaining within the value network of the established firms, innovation is often disruptive and takes place outside the established value network by introducing a different package of attributes from the one mainstream customer historically value.

The three main characteristics of the digital economy – concentration, innovation and unpredictability – should shape the enforcement of competition policy in the 21st century.

The relationship between those three characteristics are complex. On one side, the neo Schumpeterians claim that concentration is needed for innovation as it increases the appropriability of its benefits and, in any case, that innovation threat limits the market power effects of concentration. On the other side, the neo Brandeisians claim that concentration may slow down innovation as contestability is needed to stimulate it and that the concentration of innovation is, in any case, detrimental for the economy and the society. This debate, in particular the respective effects of appropriability and contestability, is very difficult to arbitrate, in particular when markets are unpredictable. However, the three main characteristics of the digital markets give some directions for the antitrust objectives, theories of harm, process and remedies in the 21st century.

As digital firms mainly compete in innovation, antitrust agencies should mainly aim at maintaining an "*innovation level playing field*" and ensure that a new innovator in a garage has the same chances as the big tech firms to develop and then diffuse her innovation. In other words, markets should remain contestable and contested. In addition, as the results of the digital innovation are often uncertain but also disruptive and unpredictable, agencies should look not only at the innovation outputs (the future products and services) but also at the innovation inputs—what David Teece calls the innovation capabilities. Those capabilities vary across industries and their innovation paths. In digital, they include data, computing power, computing skills or risky and patient capital. Thus, agencies should focus on the firms controlling the digital innovation capabilities and ensure that the key capabilities remain available to all. More controversially, antitrust agencies may also want to ensure a certain degree of diversity in the innovation field as evolutionary economics shows us that diversity may stimulate the level and the resilience of innovation.

The antitrust enforcers should then focus their attention on corporate behaviours that try to unlevel the innovation field. This is the case when big firms foreclose or limit access to key innovation capabilities. This was possibly the strategy of Twitter when it limited access to its data to PeopleBrowsr. Or when big firms combine their large users' base and important economies of scope to envelop their efficient but smaller and niche competitors. This may have been the strategy of Alphabet using Google Search to envelop the competitors of Google Shopping. Or when big firms try to identify their potential competitors when they are small and then, with mergers or acquisitions, kill them while swallowing their innovation. This may have been the strategy of Facebook when it bought WhatsApp.

To be meaningful, those antitrust interventions should be sufficiently quick given the rapid pace of innovation and the possible irreversibility of market tipping. There may be a trade-off between the velocity and the quality of the process. To reduce this tension, authorities should increase their expertise and reduce their asymmetry of information vis-à-vis the digital firms. This is why the recent expert reports, the hiring of data scientists and AI experts and the increase transparency imposed by several new regulations, such as the recently adopted Platform-to-Business EU Regulation 2019/1150, are all welcome.

As most digital firms compete on innovation, antitrust agencies should maintain an innovation level playing field.

This is also why a possible resurgence of the interim measures in the wake of the *Broadcom* case should be praised. In fact, the relevant EU rule on interim measures integrates the decision theory framework. Article 8 of Regulation 1/2003 provides that antitrust enforcer should impose interim measures when (i) there is a risk of serious and irreparable harm, i.e., the costs of type II errors (under-enforcement) are high, and (ii) when there is a prima facie case of finding an infringement, i.e., the risks of type I errors (over-enforcement) are low. As several recent policy reports have shown, the costs of type II errors may be higher in the digital economy because of the possible irreversibility of market tipping while the risks of type I errors may be lower in the digital economy because of the high market concentration. So applying the legal rule, which is consistent with the insight of the economic theory under uncertainty, may lead to the imposition of more interim measures in the digital sector.

However, the most difficult issue for the antitrust enforcer is the choice of the appropriate remedies as the *Google Shopping* case illustrated. The choice of remedies has never been easy but given the rapid and unpredictable evolution of technology and markets as well as high information asymmetry between enforcers and firms, remedies design is particularly complex in the digital economy. This is probably where antitrust enforcers, with the support of the Courts, should be the most innovative. They could innovate in two directions. First, agencies may involve even more the parties, investigated firms and complaints alike, into the design of the remedies. In the same vein, Jean Tirole calls for a more "participatory antitrust". Second, the agencies may experiment different types of remedies and learn by doing. There is an obvious tension between regulatory experimentation, which is necessary when uncertainty is high, and legal predictability, which is indispensable when a legal instrument is based on open norms and allows extensive remedies. Experimentation leads to long term benefits when the best solution is found but entails transitory costs until the solution is found. To reduce those transitory costs, experimentation may be limited to remedies which are behavioural (as they in general less costly for firms than structural remedies) and which have been co-designed with the parties involved. In any case, in the digital sector, behavioural access remedies are often preferable to structural separation remedies because the former keep the benefits of the economies of scope on the supply-side and ecosystem synergies on the demand-side.

In brief, contemporary antitrust should aim at ensuring innovation level playing field and possibly diversity. Agencies should focus on corporate behaviours that try to unlevel the innovation field by foreclosing access to key innovation capabilities, enveloping efficient but smaller and niche competitors or killing young potential competitors while swallowing their innovation. Agencies should do that quickly, when justified by imposing interim measures. Moreover, they should be more participatory and experimental in their remedies design.

As digital innovation is often unpredictable, the best objective for the antitrust agencies is to protect the competitive process.

That leads us to a more fundamental question; what should be the normative framework for antitrust intervention in an economy that is more concentrated, innovative and unpredictable? The ordo-liberalism developed in the thirties by the Freiburg School as a reaction against the concentration of economic and political power in the Nazi Germany, may be a good place to start. Ordo-liberalism is not monolithic and has evolved over time but one of its main insights is the need to promote the competitive process and to protect the rivalry between firms. When competition in innovation is based on rivalry and future is very difficult to predict, it is probably better to pursue the competitive process as an objective in itself instead of focusing on the efficiency outcome. Uncertainty inevitably implies that competition authorities will make mistakes. Those should be minimized but, as puts by Jean Tirole, we should err on the side of competition. So yes, I suggest that the goal of competition policy in the digital era should have an ordo-liberal flavour and protect, as such, the competitive process and firms rivalry. ■

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